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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA-SAN JOSE DIVISION

JASBIR GILL, MAHMOUD KEDKAD,

Plaintiffs,

vs.

KNOWLEDGESTORM, INC. a corporation, DOES 1 THROUGH 50,

Defendants.

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Case No. C 07-04112PVT

PLAINTIFF GILL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT OR PARTIAL SUMMARY JUDGMENT

Date: June 3, 2008
Time: 10:00 a.m.
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A. INTRODUCTION

This action arises out of claims that plaintiffs were subjected to demeaning and humiliating racial epithets by their supervisor and that plaintiff Gill was terminated ten days after she and her co-worker, plaintiff Kedkad, reported racial harassment to their supervisor's boss, Jason Hoback, for the third time without any action being taken.

Plaintiff opposes each and every basis for Summary Judgment or Partial Summary Judgment. Defendant's Motion for Summary Judgement or Partial Summary Judgment is without merit as there is sufficient disputed evidence of severe or pervasive racial harassment. Defendant's characterization of comments such as "I hate Indians, I wish they would go back to India," and "I hate Muslims, they are all terrorists" as being "social commentary" rather than harassment is contrary to any reasonable interpretation of such comments.

Additionally, defendant's claim that it was unreasonable for plaintiff to report the racial harassment to Jason Hoback, the Director of Sales and the supervisor of the harasser, rather than the CEO, at the very least merely constitutes a question of fact for the jury which goes to the issue of damages, not liability.

Finally given the proximity in time between plaintiff reporting the racial harassment and her firing (just ten days after her third complaint) there is a triable issue of fact as to whether her complaints were a motivating factor in terminating her.

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B. SUMMARY JUDGEMENT MAY NOT BE GRANTED UNLESS DEFENDANT MEETS ITS BURDEN OF SHOWING THAT PLAINTIFF CAN NOT PREVAIL AS A MATTER OF LAW, ON ANY THEORY OF RECOVERY

In defendant's motion for summary judgment, defendant must negate an essential element of each of plaintiff's causes of action. *Wattenberger v. Cincinnati Reds, Inc.* (1994) 28 CA 4th 746.

A defendant moving for summary judgment must disprove at least one essential element of each cause of action, or show that an element of each cause of action cannot be established. *McManis v. San Diego Postal Credit Union* (1998) 61 CA 4th 547, 555. A moving party defendant must show that, under no possible hypothesis within reasonable purview of the allegations of complaint, is there a material question of fact which requires examination by trial. *Id*. All doubts as to whether any material, triable issue of fact exists are to be resolved in favor of party opposing summary judgment. *Podolsky v. First Healthcare Corp.* (1996) 50 CA 4th 632, 642.

The court should strictly construe the moving parties' papers and liberally construe those of opposing party to determine if there is a triable issue of material fact. *Stimson v. Carlson* (1992) 11 CA 4th 1201, 1205. All doubts as to the propriety of granting a motion should be resolved in the favor of the party opposing the motion. *Evan F. v. Hughson United Methodist Church* (1992) 8 CA 4th 828, 842.

The moving party has the burden of establishing the absence of a genuine issue of fact on each issue material to its case. *Kulesa v. Castleberry* (1996) 47 CA4th 103

C. THE LEGAL STANDARD FOR RACIAL HARASSMENT

California Government Code 12940(j)(1) prohibits harassment based upon any of the protected characteristics, including race. The protection against discrimination and harassment because of race includes the perception (even if wrong) that the person may have any of the protected characteristics or that she is associated with any of the perceived characteristics. California Government Code 12926(m).

A prima facie case of racial harassment is met by evidence that: 1) plaintiff belongs to a protected group, 2) that plaintiff was subjected to unwelcome racial harassment, 3) the harassment was based on race, 4) the harassment was sufficiently pervasive or severe so as to alter the conditions of employment. *Rodgers v. Western-Southern Life Insurance* (7th Cir. 1993) 12 F3d 668, 675.

Furthermore, defendant is strictly liable where the harassment is perpetrated by plaintiff's supervisor. *State Dept. Of Health Services v. Superior Court* (2003) 31 C4th 1026, 1041.

The level of severity or pervasiveness is generally a question of fact and is dependant, on, among other things who is doing the harassing. *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F3d 917, 926. Whether the conduct is sufficiently abusive is to be determined by looking at all of the circumstances, including: the frequency of the conduct, its severity, whether it involves physical conduct, and whether it unreasonably interferes with an employees work. No single factor is required. The courts must consider "all of the circumstances." *Harris v. Forklift Systems, Inc.* (1993) 510 US 17; *Hostetler v. Quality Dining, Inc* (7th Cir. 2000) 218 F3d 798, 806.

Both a subjective and objective standard are used to determine whether the

conduct was abusive. For purposes of summary judgment, the objective standard is met if a reasonable person with the same characteristics would consider the conduct in question sufficiently severe or pervasive to create an abusive work environment. *Ellison v. Brady* (9th Cir. 1991) 924 F2d 872, *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 CA3d 590.

The required showing of severity of the harassing conduct varies inversely with the frequency of the conduct; i.e. the more incidents the less severe they need to be to establish a hostile environment. *Elison, supra* at 878.

It has been noted that determining whether there was a hostile environment "is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Systems, Inc.* (1993) 510 US 17, 22. The courts have also noted that drawing the line between actionable and non-actionable harassment is not always easy.

> "On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers...." *Baskerville v. Culligan Int'l Co.* (7th Cir. 1995) 50 F.3d 428, 430.

In the instant case it is clear that the conduct complained of is not simply occasional boorish banter. Rather it is on the "other side." Furthermore, unlike the cases relied upon by defendant, the harassing party in this case occupied a position of authority. Defendant's reference to *Lyle v. Warner Bros. Television Prods*. (2006) 38 C4th 264 does not support their argument. *Lyle,* supra involved a claim for sexual harassment based upon the discussion of writers in preparing scripts for the television show *Friends*. The work at Knowledgstorm can hardly be described as such an environment, nor comments about hating particular ethnic groups "discussion" of race as "social commentary," or "offhand comments." Rather the comments were hateful, and so clearly hostile and demeaning as to alter the recipients work environment in a very substantial

way, given the fact that it was coming from plaintiff's supervisor.

The specific circumstances of the working environment and the relationship between the harassing party and the harassed can bear on whether that line is crossed. Thus in *Quantock v. Shared Marketing Services, Inc.,* (7th Cir. 2002) 312 F.3d 1408 the court reversed a summary judgment in the defendant's favor, noting the importance of the defendant's "significant position of authority" and the close working quarters. *Quantock,* supra at 1414.

As noted in *Brooks*, supra, which found one incident of physical harassment insufficient, one incident could very well be sufficient if it was perpetrated by a supervisor, rather than a coworker, as is the case in this matter. *Brooks*, supra at 927, footnote 9.

In *Dee v. Vintage Petroleum* (2003) 106 CA4th 30, the court held that a single racial slur by a supervisor is sufficient to constitute severe racial harassment. The Court held that the comment "it is your Filipino understanding versus mine" was sufficient to create a triable issue of fact as to racial harassment. The court noted the importance of the fact that the comment was by her supervisor, and that those factors, along with his abusive conduct toward her were sufficient to constitute racial harassment.

As noted with approval in *Dee*, supra and stated in *Rodgers v. Western-Southern Life Insurance* (7th Cir. 1993) 12 F3d 668, 675 "no single act can more quickly 'alter the conditions of employment and create a hostile an *abusive environment'... than the use of an [unambiguous] racial epithet."* In *Taylor v. Metzger* (1998) 152 N.J. 490, 508, the New Jersey Supreme Court reversed a summary judgement in which it concluded that where a supervisor makes a single racial slur, that exacerbates the severity of the remark sufficient to establish a triable issue of fact.

This case, unlike *Dee*, supra does not involve just a single incident, but rather several incidents to plaintiff Gill, as well as to plaintiff Kedkad and to another employee, Joe Niederberger, clearly establishing at a minimum a triable issue of fact as to whether their was a hostile work environment created by the supervisor.

Furthermore, in *Cruz v. Coach Store Inc*. (2nd Cir. 2000) 202 Fed 560, 570, the court held that evidence of similar slurs directed at other minorities may contribute to the overall hostility. In that respect the numerous other racial slurs that were directed at Kedkad and told to a co-worker about plaintiff's such as "sand nigger" and "camel jockey" and discussed with Gill and together reported to Hoback are further evidence of a hostile working environment created by a supervisor and of Brown's racial animus.

Thus we are not faced with the isolated, stray or teasing comment. These comments were, with due respect to defendants characterization as just "social commentary," about as hate filled and abusive as they could get. Coupled with the fact that they were made by the plaintiff's supervisor, and were reported to his supervisor and yet nothing was done, clearly creates a triable issue of fact as to whether they were severe enough to alter the conditions of employment.

Finally, the same actor principle does not apply were there is direct evidence of racial animus, such as this case. That would mean that regardless of the direct evidence of racial hostility and harassment, one could racially harass and terminate an employee with impunity merely because he had hired that person. Furthermore, Brown's deposition testimony, which was not available at the time of filing the opposition was that he could not remember being the one to make the decision to hire plaintiff. Plaintiff requests that she be permitted to submit this evidence if the court finds that this issue is

dispositive.

D. NO SUMMARY JUDGEMENT IS AVAILABLE ON THE BASIS OF "AVOIDABLE CONSEQUENCES"

Defendant's assertion that the "avoidable consequences" defense is a bar to the action is incorrect. First, the defense applies only to damages, not to liability. *State Dept. of Health Services v. Superior Court* (2003) 31 C4th 1026, 1045. Also, the issue of whether plaintiff's reporting to Jason Hoback on three occasions was reasonable is, at the very least, a question of fact since it may be found to have been reasonable conduct in light of all of the circumstances, and that Hoback's failure to report it on three occasions is evidence that defendant does not have an adequate system for training, reporting and dealing with such claims. No summary judgement is available on this ground. *Myers v. Trendwest Resorts Inc*. (2007) 148 CA4th 1403, 1418.

E. THE EVIDENCE OF RACIAL HARASSMENT SHOWS IT WAS SEVERE OR PERVASIVE

Joe Brown, Knowledgestorm's West Coast Regional manager, was both Gill and Kedkad's supervisor. Gill and Kedkad were sales people stationed in defendant's South San Francisco office. Jason Hoback was Brown's supervisor. Brown and Hoback were commuting managers working out of the Atlanta and South San Francisco offices. (Kedkad depo. 62: 24-25; 63:1-6; 64:2-17). Joe Brown was the Regional Sales Manager and Jason Hoback was his boss, the Director of Sales. (Niederberger depo. 23:12-25; 24:1-4).

During the week of January 15, 2007, Joe Brown said to plaintiff Gill, "Is that what they teach in India, you need to learn the right way, which is the white man's way." (Gill depo. 139:19-25; 140: 1-6).

The week of January 15, 2007, Gill heard Joe Brown ridicule her co-worker, plaintiff Kedkad, by saying "Why are you dressed like this, this is not the Middle East." (Gill depo. 163:12-18; 164:3-20).

On January 31, 2007, plaintiff Gill spoke to Jason Hoback and complained about the racial slurs, discrimination and harassment but Hoback did nothing. He said that she was just over reacting. (Gill depo.141:18-25; 142:1-9; 166:10-15). This is clear evidence that Knowledgestorm does not properly train its managers or take such complaints seriously.

On February 21, 2007 Joe Brown commented to plaintiff Kedkad that he did not like Indians as they were taking all the jobs. Joe Brown asked him if he had heard from plaintiff Gill who was on vacation in India. Joe Brown said that maybe she won't come back and anyways, there are too many Indians here who are taking away the jobs, and that he hated these Indians. Kedkad told Gill about the comment. (Gill depo. 144:17-25; 145:1-4; 145:14-25; 146:1-6).

On another occasion during the second week in February 2007, Brown stated to plaintiff that "Non-whites have a very difficult time in sales and they should just pack up their bags and leave." (Gill depo.150:3-15). This comment alone could lead plaintiff to conclude that because of her race she could never succeed at Knowledgestorm.

During the last week of March, Gill complained about these comments to Jason Hoback. (Gill depo. 147: 6-22).

The week of March 19, 2007, Joe Brown called plaintiff Gill and shouted at her and in a very threatening voice asked her if she was leaving or staying at knowledgstorm. Gill depo. 167: 12-25; 168:1-25. Brown treated Gill disrespectfully. (Gill depo. 169:1-25).

The week of March 26, 2007, Joe Brown asked Gill her views on the Iraq war. When plaintiff stated that it was not the time and place for such a

discussion, Brown stated I don't care, I hate Muslims and I think all Muslims are terrorists anyway. (Gill depo. 148: 20-25; 149:1-8). It does not matter if Gill actually was Muslim, only Brown's perception. California Government Code 12926(m).

On April 3, 2007 plaintiffs had a telephone conversation with Jason Hoback. Plaintiffs Gill and Kedkad told him about the recent racial slurs and discrimination from Joe Brown. Jason Hoback became very angry with them and threatened plaintiffs and said that he could fire them for creating trouble. (Gill depo. 172: 24-25; 173: 1-4; 174:25; 175:1-25; 176:1-15; 177:1-10).

Ten days later, on April 13, 2007, Hoback made good on his threat and fired plaintiff Gill. At the time of the termination, Hoback did not tell Gill specifically why she was being terminated, only that she had allegedly violated company policy. Defendant now claims that the reason was that plaintiff had printed out her resume using company paper. However, Hoback did not even ask plaintiff why she had printed her resume. Plaintiff testified that the reason for printing the resume was that her attorneys for her H-1B visa had requested copies of the resume. (Gill depo.135:2-25; 136:1-25; 137: 1-9).

Furthermore, other employees who had printed out resumes or even accepted work with another company were not fired. (Gill depo: 139:6-14).

Gill observed that Brown treated other employees differently and discussed the racial harassment with another employee, Mahmoud Kedkad who was having a similar experience with Brown. (Gill depo. 61:9-25; 62:1-23).

Plaintiff Kedkad also testified that he was racially harassed by the same supervisor and that the harassment was known to Gill.

In December 2006, he heard his supervisor, Joe Brown, say to another employee, Joe Niederberger, "What do you think of the camel jockey we've hired. Why don't you take the swat out on him so he will start making some

calls." (Kedkad depo. 98:22-25; 99:1-7). Kedkad reported these racial comments to Brown's boss, Jason Hoback at the end of January 3007. (Kedkad depo. 103:16-22).

The week of January 15, 2007, and on other occasions as well Joe Brown ridiculed plaintiff Kedkad and said "Why are you dressed like this, this is not the Middle East." (Kedkad depo. 105:17-25; 106:1-25; 107:1-11; 108:1-14).

On January 31, 2007, after a face to face meeting with a business prospect, when Kedkad spoke to Brown's boss, Jason Hoback about the racial slurs Hoback responded: "Joe Brown is inexperienced in management and might have said things that he did not mean. Please bear with us for the next few months. We will give you big accounts and you will make a lot of money." (Kedkad depo. 103:16-22; 104: 15-25).

On February 21, 2007, plaintiff was not invited to a business dinner by Joe Brown in which the entire Western region was invited. A joke was made by Brown that plaintiffs would not be invited to meetings in San Francisco as they would scope out terrorist targets. (Kedkad depo. 121:13-25; 122:1-8

In February 2007, Joe Brown asked him if he had heard from plaintiff Gill who was on vacation in India. Joe Brown said that maybe she won't come back and anyways there are too many Indians and expressed the hope that she would not return and then there would be "one less Indian." (Kedkad depo. 111:2-18).

On March 21, 2007, plaintiff Kedkad spoke to supervisor Jason Hoback on the phone and reiterated the racial slurs and discrimination meted out to him and Ms. Gill from Joe Brown. Hoback became angry when he reported the problems. (Kedkad depo. 115:5-8; 117: 13-23).

In late March 2007, after a joint meeting with a business prospect, Joe

Brown said to plaintiff Kedkad, "You should go back to school so you can learn to read, write and talk normal, like us." (Kedkad depo. 125:1-11).

In the latter part of April or beginning of May 2007, Kedkad was also told by Gill that Brown had been using the term "sand nigger." (Kedkad depo. 4-22).

A former employee, Joe Niederberger, also testified that Joe Brown, plaintiffs' supervisor, and an employee of defendant, had on numerous occasions used the term "sand niggers" and "camel jockeys" referring to plaintiffs and that he had reported it to Hoback. (Niederberger depo. 30: 9-21; 33:7-22; 36:6-20; 40: 22-25; 41:1-25; 42:22-25; 43 1-25; 45:3-8; 45:18-25; 46:1-17

On April 24, 2007, Niederberger wrote an email to Kelly Gay advising her that there was racial discrimination and harassment in the South San Francisco office, and that it was coming from Joe Brown. Gay testified that this email and information from Joe Niederberger was not enough to cause her to conduct any investigation.

While these comments were being made, plaintiffs discussed the comments amongst themselves and were aware of the comments being made by Brown about each other and together complained about the comments to Hoback, who took no action. (Gill depo. 157:2-5).

Defendant's reference to any of these comments being "hearsay" is a misunderstanding of the hearsay rule. "Hearsay" is an out of court statement introduced for the truth of the matter stated. Obviously, these statements are asserted not for their truth, but as evidence that they were made. In any event they would be considered admissions against interest as an exception to the hearsay rule as well as the state of mind exception.

F. THERE ARE TRIABLE ISSUES OF FACT AS TO WHETHER PLAINTIFF WAS TERMINATED IN RETALIATION FOR PROTECTED ACTIVITIES

Plaintiff alleges that she was fired in retaliation for complaining about her supervisor's racial comments on three occasions, the last being April 3, 2007 just ten days before she was fired in a telephone conversation with Hoback and Brown. She further testified that during the April 3, 2007 discussion with Hoback in which she and Kedkad complained about Brown, Hoback became angry and threatened to fire them.

A prima facie case of retaliation is established by showing: 1) she was engaged in protected activity; 2) she suffered adverse employment action, and 3) there was a causal connection. *Yanowitz v. L'Oreal USA Inc.* (2005) 36 C4th 1028.

California Government Code 12940(h) retaliation against an employee for complaining about any of the rights generated under that statute, which would include, obviously, racial harassment.

Furthermore, the employer's knowledge of those complaints together with proximity in time are sufficient to create a triable issue of fact that there was a causal connection between the protected activity and the firing. *Jordan v. Clark* (9th Cir. 1988) 847 F2d 1368, 1376. *Passantino v. Johnson and Johnson Consumer Products Inc.* (9th Cir. 2000) 212 F3d 493, 507. Very little evidence of discriminatory motive is required where there is close proximity in time. *Strother v. Southern California Permanente Med. Group* (9th Cir. 1996) 79 F3d 859. A seven week interval creates an inference of nexus. *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F3d 802.

In the instant case. A ten day interval certainly raises that inference and, together with the direct evidence of racial animus by Brown and the fact that Brown and Hoback were the ones to fire plaintiff, it is sufficient to create a

triable issue of fact as to retaliation.

G. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

Plaintiff also alleges that she was targeted by defendant because she opposed illegal practices of her employer and played a part in her termination. Specifically, she testified that she was asked to inflate proposals by adding advertising even when it was known that there would be no advertising in the contract. (Gill depo. 181: 8-25; 182: 1-3). She also testified that she was told to alter start dates thereby short changing customers. (Gill depo. 185: 4-25; 186:1-20). She believed that this was done to mislead potential buyers of the company. (Gill depo. 187:1-25).

A cause of action for termination in violation of public policy exists where an employee is terminated for refusing to participate in what they believe to be illegal activities. *Tameny v. Atlantic Richfield* (1980) 27 C3d 167.

Plaintiff's opposition to these practice are protected under California Business and Professions Code 17200 which prohibits unfair business practices. Accordingly, there is a triable issue of fact as to whether her termination was in violation of public policy.

Furthermore, her termination as a result of engaging in the protected activity of complaining of racial harassment is also a violation of public policy. *Stevenson v. Superior Court* (1997) 16 C4th 880, 885.

H. CONCLUSION

Contrary to defendant's assertion, this case is not about isolated "discussions" of race amounting to "social commentary." If statements such as "I hate Indians," "Where do you think you are, India? Learn to do it the white

way," "I hate Muslims, they are all terrorists," hoping plaintiff would leave the country so that there would be "one less Indian," as well as comments regarding "sand niggers," and "camel jockeys," are just social commentary, one may as well throw out any application of the law on racial harassment.

Given the fact that these comments were made by plaintiff's supervisor, the law is clear that a triable issue of fact exists as to whether this amounts to severe or pervasive harassment. In our view, it does.

Furthermore, there is a triable issue of fact whether plaintiff's termination coming just days after she last reported racial harassment and was greeted with a threat of termination. Particularly since the termination was by the two individual involved in her harassment; the person to whom she had reported the harassment and the person about whom she had complained.

Plaintiff respectfully requests that defendant's Motion for Summary Judgement, or in the alternative, Partial Summary Judgement be denied.

Dated: May 12, 2008

LAMBERTO & KREGER

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